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IN THE

Supreme Court of the United States

October Term—19[redacted] 1949

No. 150

ALBERT G. DICKINSON,
Petitioner,

against

PETROLEUM CONVERSION CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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ALBERT G. DICKINSON,

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against

PETROLEUM CONVERSION CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Albert G. Dickinson, respectfully prays that a writ of certiorari issue to review an order of the United States Court of Appeals for the Second Circuit, entered March 31, 1949, denying your petitioner's motion to dismiss the purported appeal of William M. Duffy, Jr., as temporary receiver of Petroleum Conversion Corporation, bankrupt, on behalf of said Petroleum Conversion Corporation, from a judgment of the District Court for the Southern District of New York, entered August 3, 1948, in the action entitled "Albert G. Dickinson, plaintiff, against Arthur W. Rinke, et al., defendants, Petroleum Conversion Corporation, E. Lewis Burnham and James A. Vaughan, et al., interveners".

Opinions Below

The opinion of the Court of Appeals for the Second Circuit (R. 62), filed on March 31, 1949, is reported at 173 Fed. 2d, 738.

Jurisdiction

Jurisdiction to issue the writ requested is found in Title 28, United States Code, Section 1254(1).

Questions Presented

1. Where two rival claimants each sought the recovery of a particular sum from other parties to the action, and judgment after trial, entered in 1947, dismissed on the merits one of said claims and granted recovery in a fixed amount to the other claimant, a spurious class,* and provided for judgment apportioning said recovery to members of the class after opportunity to absent members to intervene and claim their respective shares, and all other issues in the action were disposed of by said 1947 judgment, and the unsuccessful claimant failed to appeal therefrom within the statutory period, is its receiver in bankruptcy nevertheless entitled to a review of said 1947 judgment, dismissing its claim on the merits, by an appeal from the 1948 judgment apportioning the recovery to members of the class constituting the successful claimant?

2. Where a corporation intervenes in an action and pleads a claim against the plaintiff and one of the defendants for a particular sum of money based upon breach of

* Rule 23(a)(3), Federal Rules of Civil Procedure.

fiduciary obligation, and representatives of subscribers to the stock of said corporation simultaneously intervene and assert a claim for the same amount on behalf of the class on the ground that the sum sought came out of funds belonging to said class, alleging, however, that either said class or the corporation was entitled to the recovery, and the action is tried on behalf of both the corporation and the class by a single counsel, the attorney for the corporation, and at the end of the trial both submitted a single brief and a single set of proposed findings and conclusions of law, both leaving it to the trial court to decide whether, if a recovery was to be had, to which of said claimants it should be awarded, and the decree, dismissing the claim of the corporation on the merits and sustaining the claim of the class and fixing the total recovery thereon, was entered on the joint motion of the attorney for the corporation and the attorney for the class, and the attorney for the class was an officer of and an attorney for the corporation, should the Court of Appeals have dismissed the appeal seeking review of said decree on behalf of the corporation by its receiver in bankruptcy, on the ground that the decree was a consent decree, it appearing that both the corporation and the class had asserted and prosecuted their claims and jointly entered said decree on the basis that it was satisfactory to both if either recovered?

3. Is an appeal a nullity where:

(a) It is taken, not by a party to the action, but by a receiver in bankruptcy of such a party, which receiver has neither intervened in the action nor been substituted for said party;

(b) Said party, on whose behalf the appeal purportedly is taken, has neither before nor after bankruptcy authorized or approved said appeal;

(c) The notice of appeal was not subscribed by the receiver or his attorney, but by the attorney in the action for the bankrupt;

(d) The appellant-receiver, appointed outside the district of the action, did not obtain ancillary receivership in said district; and

(e) The decree specified in the notice of appeal did not adversely affect the interests of the appellant, and the decree which did was not cited therein?

4. (a) Does Bankruptcy Act, §64(a)(1) empower the referee in bankruptcy to authorize certain of the creditors to prosecute, on behalf, and in the name, of the bankrupt and the trustee, but without liability to the bankrupt estate for any costs, fees or expenses, unless successful, the appeal by the bankruptcy receiver from a judgment dismissing a claim by the bankrupt, after the trustee, with the approval of the referee and without opposition of the creditors, had declined to prosecute said appeal?

(b) If so, could said creditors prosecute or oppose a motion to dismiss said appeal without becoming parties to the record?

5. Did the Court of Appeals below fail to discharge its judicial responsibility by expressly shifting to this Court the decision as to whether an admittedly non-binding and erroneous precedent should be repudiated, and by making a *pro forma* decision, in order to advance the matter to this forum, thereby depriving petitioner of a decision on the merits?

Summary Statement of the Matters Involved.

The facts are not in dispute (R. 41).

On March 25, 1938, plaintiff-petitioner Albert G. Dickinson commenced an action in the United States Court for the Southern District of New York against defendant Fred B. Lloyd and others to impress an equitable lien upon, and for an accounting and discovery with respect to, certain stock issued in the name of Fred B. Lloyd by Petroleum Conversion Corporation, not then a party to the action (R. 3). Plaintiff's claim was dismissed after trial, and on appeal the judgment was reversed by the Court of Appeals for the Second Circuit, and the action remanded for a new trial (*Dickinson* v. *Rinke*, 132 Fed. 2d, 805).

On December 3, 1943, and prior to the new trial, Petroleum Conversion Corporation was permitted to intervene, as were also E. Lewis Burnham and James A. Vaughan in behalf of themselves and the subscribers to a certain stock subscription agency known as the "Rinke Agency Subscribers" (R. 3). The Petroleum Conversion Corporation filed a counterclaim in which it demanded cancellation of a large number of its shares sought by the plaintiff, Dickinson, on the ground that they had been fraudulently issued and the recovery of $87,310.28 from said Dickinson and defendant, Lloyd, alleged to have been unlawful profits obtained in breach of fiduciary duty, by reason of the following:

Petroleum Conversion Corporation asserted that it was a reorganization of Knox Process Corporation, organized to develop an oil cracking process; that Lloyd was an officer and director of both corporations, to the knowledge of Dickinson; that Dickinson had purchased the Knox

Process Corporation oil cracking plant at a mechanic's lien foreclosure sale for $87,310.28; that in violation of his preceding agreement with Knox Process Corporation to sell said property to it for stock, he had obtained $176,245.24 out of funds paid by the so-called "Rinke Agency Subscribers" under a stock subscription agency, and that out of said sum Dickinson divided $87,310.28, the cash profit, with Lloyd in breach of Lloyd's fiduciary obligation, and that Dickinson had then transferred the plant to the Petroleum Conversion Corporation for which he was voted a large block of its stock, the subject of the complaint (R. 15).

The interveners E. Lewis Burnham and James A. Vaughan, on behalf of themselves and other Rinke Agency Subscribers asserted a similar counterclaim against Dickinson and Lloyd, seeking to recover the same $87,310.28, also as a secret and illegal profit (R. 9). However, said counterclaim did not deny the corporation's right to recover said sum. On the contrary, it alleges:

> "Either (Petroleum) Conversion (Corporation) is entitled to recover from Dickinson and Lloyd jointly and severally the said illegal and fraudulent profit of $87,310.28, or the interveners herein, for and in behalf of themselves and all other similarly situated Rinke Agency subscribers, are entitled to recover said illegal and fraudulent profit of $87,310.28 from Dickinson and Lloyd jointly and severally." (R. 13, par. 22.)

The Rinke Agency subscribers were stockholders of Petroleum Conversion Corporation (R. 11, 19, 54). James A. Vaughan was an officer of and attorney for the corporation (R. 6, 8). The Rinke Agency subscribers and the corporation joined forces to secure a recovery for one or the other. Their pleadings are so substantially similar in

language as to evidence a single authorship (R. 9, 15). The attorney of record for Petroleum Conversion Corporation (R. 54) tried the action on behalf of both the corporation and Burnham and Vaughan (R. 6); at the conclusion of the trial a single brief was filed by said interveners; likewise, they jointly submitted proposed findings of fact and conclusions of law and left it to the Court to decide to which of the interveners judgment should be awarded (R. 6).

After the second trial a decree was entered in the District Court on April 10, 1947 (R. 23), disposing of all the claims of all of the parties before the Court (R. 5, 63, 64). Said decree dismissed all of the claims of Petroleum Conversion Corporation. In particular, it dismissed on the merits its claim to said $87,310.28, but sustained the claim of Burnham and Vaughan on behalf of themselves and the other Rinke Agency subscribers as a spurious class suit (R. 5) for the recovery of not only the said $87,310.28, but for the total sum of $176,245.24 received by Dickinson and Lloyd, with interest from 1926 (R. 27). It further provided for notice to the Rinke Agency subscribers and successors to their interest, not then parties to the action, as to their rights under said decree, and to intervene and assert their claims for their respective shares of said recovery and for judgment in favor of those whose claims were allowed by the Court (R. 28, 29). Said decree was entered on the motion of the attorney for Petroleum Conversion Corporation jointly with the attorney for the Rinke Agency subscribers (R. 24).

No appeal was at any time taken by Petroleum Conversion Corporation from said decree, nor has Petroleum Conversion Corporation at any time authorized any appeal to be taken therefrom on its behalf (R. 7). On the contrary, it deliberately failed to appeal therefrom (R. 6).

After the proceedings in accordance with said decree of April 10, 1947, a judgment was entered on August 3, 1948, awarding to the members of the said class or their successors who had appeared in the action, sums totaling $408,949.57, constituting the said $176,245.24 with interest from 1926 (R. 30 *et seq.*). It is to be noted that the decree of August 3, 1948, in no way disposes of any of the claims of Petroleum Conversion Corporation.

Considerably after the then statutory period to appeal from the April 10, 1947 decree had expired (28 U. S. C., §230) Petroleum Conversion Corporation was adjudicated a bankrupt in the District of Delaware on August 8, 1948, and one Duffy was appointed its temporary receiver (R. 45). By a notice of appeal dated September 1, 1948, and on that day filed in the office of the clerk of the Southern District of New York, said Duffy as such temporary receiver in bankruptcy, on behalf of the bankrupt, purported to appeal from said decree of August 3, 1948, in so far as it dismissed on the merits the claims of the bankrupt (R. 38). As already noted, there were no such provisions in said decree, nor is the 1947 decree mentioned therein. Further, although the notice of appeal named said temporary receiver as the appellant, said appeal was not subscribed by him or by his attorney, but by the attorney for the corporation (R. 39), and there was no compliance with General Order 44 (11 U.S.C.A., Sec. 53) (R. 7). Moreover, no ancillary receivership was obtained by said temporary receiver in the Southern District of New York; he at no time was substituted for the corporation, and he at no time secured leave to intervene in said action and is not a party thereto (R. 7).

Petroleum Conversion Corporation did not at any time authorize or approve said notice of appeal (R. 7).

Duffy, after appointment as trustee, decided not to prosecute said appeal on the ground that it would be fruitless (R. 58). The creditors, after notice, did not object and the referee, by an order dated February 9, 1949, approved such decision (R. 40). By a further order of the same day, upon the alleged authority of Bankruptcy Act, §64a (1) (R. 48, 60, 61), four named creditors were authorized to prosecute the appeal on behalf of Petroleum Conversion Corporation and of its trustee without cost to the bankrupt estate, unless successful (R. 47). Said creditors did not become parties to said action or to the appeal by intervention or substitution (R. 57). But it is their attorney who alone opposed petitioner's motion to dismiss the appeal. His prior efforts to step into this litigation on behalf of former preferred stockholders failed (R. 56, par. 9, R. 60). He now appears in still another guise. In the proceedings in the Court below, perhaps to bolster his status, he described himself as attorney for the trustee in bankruptcy (R. 41, 45) for which there appears to be no sanction in the referee's order cited as authority therefor (R. 45). There obviously was no compliance with General Order 44 (R. 47). The preface to the opinion below omits description of his status (R. 62).

His motion to amend the notice of appeal (R. 46) upon which he relied to defeat the motion to dismiss "for the most part" (R. 41, fol. 55) was denied (R. 68, *et seq.*).

The Grounds on Which the Decision of the Court of Appeals Below Rested

The chief question with which the Court of Appeals was concerned in its opinion was whether Petroleum Conversion Corporation could have appealed only from the 1947 judgment, which dismissed its counterclaim on the

merits, or whether an appeal on its behalf would lie from the 1948 judgment, apportioning the recovery totaling $408,949.57 to various Rinke Agency subscribers and their successors in interest (R. 62, 63).

The opinion on this question is quite extraordinary. It reaches its conclusion neither on the basis of binding precedent nor on the merits. Contrarily, as appears from the face of the opinion, each of the three judges composing the bench hearing petitioner's application were of the conclusion and conviction that the 1947 judgment, which disposed of all of Petroleum Conversion Corporation's claims, was final and appealable and the appeal from the subsequent judgment should be dismissed. The Court said in part (R. 64, 65):

> "Thus it appears that the judgment of April tenth, 1947, finally disposed of the counterclaim of the Petroleum Conversion Corporation, as well as of any claim against that corporation by any of the parties; there remained, so far as that corporation was concerned, only the issue of those of its shares to others which the judgment directed—merely ministerial acts on any theory. * * *
>
> "Had the petition of the Petroleum Conversion Corporation to intervene been denied, the denial would have been appealable, because in that event the petitioner would not have been 'at liberty to assert or protect' its interests in some more appropriate proceeding.* If so, it is not easy to understand why a party who has been allowed to intervene, should not be allowed an immediate appeal from a judgment dismissing his claim after a trial. The petition of intervention must within its own four corners disclose the basis of the claim, and

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* Citing *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U. S. 519; *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502, 508.

> the merits so disclosed will determine the right to intervene; there would appear to be no more reason to accelerate the right to appeal when the facts which it alleges, if true, do not justify the claim in law, than when, though the allegations are enough, they turn out to be false. * * *
>
> "'In view of all members of the court, as it is now constituted, this [the provision in the 'definitive decision' of April 10, 1947 (R. 65) for subsequent proceedings to permit absent Rinke Agency subscribers to intervene and procure their respective shares of the award to the class] should make no difference for the whole counterclaim of the Petroleum Conversion Corporation had been finally disposed of on April tenth, 1947; and as to it the action was at an end as though it had been denied the right to intervene at all; indeed, the judgment was more final; so to say, because, unlike the denial of a petition to intervene, it was a bar to any effort to relitigate the claims determined.'" (Matter in brackets added.)

Nevertheless, the Court held that on this issue the case at bar was undistinguishable from *Clark* v. *Taylor*, 163 Fed. 2d, 940. In that case, the District Court had held that the Alien Property Custodian, and not the state court receiver of an Austrian corporation was entitled to prosecute its claim against the defendant association for royalties, and granted summary judgment against the receiver. The Court of Appeals for the Second Circuit dismissed the appeal from said judgment for lack of finality on the ground that the claim itself had not been adjudicated on the merits.

The Court below interpreted *Clark* v. *Taylor* as holding that until all the series of mutual rights and liabilities arising out of the transaction before the Court had been determined, no appeal would lie, "however finally any

part of those rights and liabilities might be disposed of, and that it was only in case 'transactions' or 'occurrences' wholly disconnected were coupled, as the Rules permitted, that separate appeals could be taken" (R. 66).

The *Clark* case was decided by a sharply divided bench. The majority consisted of judges (Clarke and Chase) who, though still serving, did not sit in the instant case. A strong dissenting opinion (163 Fed. 2d at 944) was there written by Judge Frank, who was a member of the bench in this case. As the opinion below points out, the *Clark* case "was decided only after the greatest deliberation and the opinions then rendered contained all that can be said in support of either view" (R. 66).

Thus the Court below found itself in something of a dilemma. On the one hand, all of the judges disagreed with the *Clark* decision, at least in so far as it applied to the instant case. On the other, it readily may be inferred, they were understandably reluctant to repudiate that precedent, in the absence of participation by their brother judges who had established it.

The Court recognized that the *Clark* case was not a binding precedent. It said: "In a final court of varying composition, it might be asking too much that the first decision should become an authoritative precedent against the convictions of the other members * * *" (R. 66).

The court escapes its "predicament" (R. 66) thus: It refuses to pass on the question; rather, it strongly suggests that a review may be secured in this Court by certiorari (R. 66, 67) but that if petitioner should here fail "we ought to be content, as we are, to sink our differences and yield to the precedent whatever our confidence in our conclusion" (R. 66). It was on that basis and not on that of binding precedent or on the merits that petitioner's motion to dismiss the appeal was denied, in so far as it

depends upon the argument that the judgment of April 10, 1947 was final as to Petroleum Conversion Corporation and that by its failure to then appeal it lost any right of review (R. 66).

In its anxiety to enable this Court to determine whether *Clark* v. *Taylor* should be repudiated, the Court below made short shrift of petitioner's contentions that the purported appeal by the receiver in bankruptcy was in fact and in law a nullity. It did recognize what it chose to describe as "formal defects" (R. 66). But it took the position that although the notice of appeal asked a review of the provisions of the judgment of August 3, 1948, dismissing Petroleum's counterclaim, and although there were no such provisions in that judgment but were contained in the judgment of April 10, 1947, from which no appeal was taken, nevertheless, "the intent was perfectly manifest and that must control" (R. 66, 67).

The Court also pointed out that although the notice of appeal described the bankruptcy receiver as the appellant, it declared that he was appealing on behalf of the bankrupt, and maintained that "since the Petroleum Conversion Corporation, though bankrupt, could take the appeal, as a step quite outside the bankruptcy proceeding, it was free to be represented by an attorney of its choice" (R. 67). In this important respect, the decision is grounded upon the thesis that Petroleum Conversion Corporation itself took the appeal.

The opinion below rests upon the further ground that it was within the power of the bankruptcy court to allow the four creditors at their own cost to prosecute the appeal (R. 67).

The Court below overruled in silence the points made by petitioner that the purported appeal by the temporary receiver was a nullity because (1) he was not a party to the

record; (2) his capacity to act as such receiver was limited to the district within which he was appointed and no ancillary receivership had been obtained by him in the Southern District of New York where said notice of appeal was filed; and (3) that Petroleum Conversion Corporation never authorized or approved said appeal. Similarly the Court below failed to hold, contrary to petitioner's contention, that the decree of April 10, 1947 was, as to Petroleum Conversion Corporation, a consent decree and therefore unappealable.

Reasons Relied on for Allowance of Writ

1. The decision below in so far as it is based upon *Clark* v. *Taylor* runs counter to long established precedents both of this Court and various Circuit Courts of Appeal. As Frank, C. J. there said in his dissenting opinion, in *Clark* v. *Taylor*, 163 Fed. 2d 940, 944, 947:

> "I dissent because this decision has marked precedential significance (since I think it overrules many decisions of the Supreme Court, of this Court, and of other Circuit Courts) * * *".
>
> "* * * (M)y colleagues are here, I think, overruling a long line of decisions (rendered both before and since the adoption of the Rules)".

See also point 8 of the dissenting opinion at page 949. And at page 950, he said:

> "Accordingly, the decision here, because of its precedential significance for many future litigants,*

* The 1948 amendment of Rule 54(b) of the Federal Rules of Civil Procedure of course does not affect the finality of the 1947 judgment in this case, nor does it resolve the future aspects of the matter; on this both the majority and the minority opinions in the *Clark* case are agreed, (163 F. 2d at 944 fn. 7; at 951 fn. 12; 952), since the Rules are effective only upon the District Courts and do not affect the appellate jurisdiction of the Courts of Appeal. And the Court below concurred, for otherwise it would not have stressed its circumspect invitation that certiorari be here granted.

> has an importance which transcends the injury it does the parties to the present suit. Inconsistent as it is with our previous decisions and with those in other circuits, it deserves and I hope that it will receive the attention of the Supreme Court."

This Court is respectfully referred to Judge Frank's extensive collation and detailed analysis of the authorities.

It is noteworthy that the opinion below refers to *Clark* v. *Taylor* as a "first decision" (R. 66) and that a majority of the total number of judges who participated both in the *Clark* case and in the instant case, have found that conclusion in the *Clark* case to be erroneous. In recognition of that fact and clearly to enable repudiation of that authority, it is submitted the Court below went as far as it reasonably could go in suggesting that certiorari be granted (R. 66, 67). The majority opinion in the *Clark* case also recognizes the need for a decision by this Court upon the issue (163 F. 2d 940, 943 fn. 4, where in discussing some of the cases relied on in the dissenting opinion, it is said: "Not all these exceptions are clear" and "Here, too, a definite rule is to be desired").

2. The Court below failed to recognize that the judgment of April 10, 1947 was, as to Petroleum Conversion Corporation, a consent decree which reason and the unanimity of authority holds unappealable.

3. The decision below sanctions an appeal by one not a party to the record; it thereby flies in the face of at least the following adjudications by this Court: *Ex parte Cutting*, 94 U. S. 14; *Ex parte Leaf Tobacco Board of Trade*, 222 U. S. 578, 581; *United States* v. *Jack*, 244 U. S. 397.

4. This matter presents questions of recurring importance in the administration of the Bankruptcy Act,

which either have not been finally settled or were decided by the Court below contrary to the probable effect of the decisions of this Court and the applicable provisions of the Bankruptcy Act.

A. There is no authoritative decision by this Court, so far as our research has revealed, with respect to the extraterritorial capacity of a receiver in bankruptcy in the absence of ancillary receivership. In so far as the decision below countenances the capacity of a Delaware bankruptcy receiver to file a notice of appeal in behalf of the bankrupt, in the Southern District of New York, it controverts the manifest purpose of Bankruptcy Act §69c (11 U. S. C. A. §109c) and General Order 51 (11 U. S. C. A. §53) which provide for ancillary receiverships (See *In re Benedict*, 140 Fed. 55); and the rationale of such decisions as *Moore* v. *Mitchell*, 281 U. S. 18, 24.

B. The decision below to the extent that it holds that a bankruptcy receiver, without intervention or substitution, becomes by the mere fact of his appointment, a party to law suits in which the bankrupt asserts a claim, conflicts with such cases as

Meyer v. *Fleming*, 327 U. S. 161;
Herndon v. *Howard*, 9 Wall. 664;
Knox v. *Exchange Bank*, 12 Wall. 379;
Johnson v. *Collier*, 222 U. S. 538;
Western Star Lodge v. *Burkes Construction Co.*, 5 Cir., 267 Fed. 550.

C. The Court below, by its decision recognizes the validity of a notice of appeal by a bankruptcy receiver

subscribed neither by the receiver nor his attorney (see Federal Rules of Civil Procedure, Official Form 27) but by the attorney for the bankrupt, despite non-compliance with General Order 44 (11 U. S. C. A. §53). See *In re: Rogers-Pyatt Shellac Co.*, 2 Cir., 51 F. 2d 988.

D. The decision below gives approval to the order of the referee in bankruptcy allowing four creditors at their own cost to prosecute the appeal. That order was made on the authority of Bankruptcy Act §64a(1) (R. 40, 41, 60, 61) although that section by its very language is applicable solely to creditors' actions to recover property fraudulently transferred or concealed by the bankrupt. And even if valid, the referee's order was insufficient *per se* to endow the four creditors and their attorney with standing in the Court of Appeals to prosecute an appeal therein or oppose the motion to dismiss. That required said creditors to become parties to the record by intervention or substitution and to subject themselves to liability for costs.

5. The procedure adopted by the Court of Appeals below in shifting to this Court the determination of whether *Clark* v. *Taylor* should be repudiated, presents a matter of fundamental importance in the administration of justice. Petitioner has been denied an adjudication to which the merits of his motion entitled him, even according to the opinion below.

The Court below chose not to pass on this precedent, established by fellow judges of the same Court, which it itself deemed not binding, and erroneous in its application to the instant case, expressly upon the chance that such precedent would be reviewed by this Court in consequence

of this application. The decision thus was, in substance, merely *pro forma*, to advance the matter to this forum. It is submitted that the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for exercise by this Court of its power of supervision.

Wherefore petitioner respectfully prays that this petition should be granted.

ALBERT G. DICKINSON,
Petitioner,
by SOLOMON KAUFMAN,
Attorney for Petitioner.

Of Counsel:
SAMUEL HERSHENSTEIN.

IN THE

Supreme Court of the United States

October Term—1948

No.

ALBERT G. DICKINSON,
Petitioner,

against

PETROLEUM CONVERSION CORPORATION.

BRIEF IN SUPPORT OF PETITION

Opinion Below

The opinion of the Court of Appeals for the Second Circuit (R. 62) filed on March 31, 1949 is reported at 173 Fed. 2d 738.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

Statement of the Case

The facts have been set forth in the foregoing petition.

Specification of Errors

It is submitted that the court below erred:

(1) in denying petitioner's motion to dismiss the purported appeal by the receiver in bankruptcy of Petroleum Conversion Corporation;

(2) in failing to hold that the judgment of April 10, 1947, dismissing the claims of Petroleum Conversion Corporation on the merits, was final, at least as to it, and that by its failure to appeal therefrom within the statutory period it lost any right of review;

(3) in failing to hold that an appeal from the decree of April 10, 1947, by or on behalf of said corporation is precluded by its undisputed consent thereto;

(4) in failing to hold that the appeal by said receiver in bankruptcy was a nullity;

(5) in failing to hold that said corporation's creditors and their attorney had no standing to oppose petitioner's motion to dismiss the appeal;

(6) in shifting to this court the determination of whether a non-binding precedent should be repudiated, without itself determining the issue on the merits.

SUMMARY OF ARGUMENT

POINT I

The judgment of April 10, 1947 was final and appealable since it determined all of the fundamental questions involved in the action and settled the substantial rights of all the parties; it in fact disposed of every issue with respect to every party before the court; the subsequent proceeding provided for in said decree did not look to any modification thereof, but rather to its implementation.

POINT II

Even if not final as to all parties, the judgment of April 10, 1947, dismissing Petroleum Conversion's counterclaim on the merits after trial was, as to it, final and appealable; *Clark* v. *Taylor* is not in point and erroneous.

POINT III

Appeal from the judgment of April 10, 1947 by or on behalf of Petroleum Conversion Corporation is precluded by its consent thereto.

POINT IV

The purported appeal by the receiver in bankruptcy of Petroleum Conversion Corporation is a nullity since:

(A) The notice of appeal sought review only of the 1948 judgment which in no way aggrieved Petroleum Conversion Corporation;

(B) The appellant-receiver, appointed outside the district where the notice of appeal was filed, and having failed to obtain ancillary receivership, was without capacity to commence or prosecute said appeal;

(C) The receiver, named in the notice of appeal as the appellant, was not a party to the record and judgment appealed from;

(D) The notice of appeal was not subscribed by the receiver, the appellant named therein, or his attorney, but by the attorney for the bankrupt, disqualified to act for the receiver and unauthorized by the bankrupt to institute said appeal.

POINT V

The bankrupt's creditors, authorized by the referee's order to prosecute the appeal, and their attorney, nevertheless had no standing to oppose petitioner's motion to dismiss the appeal, since:

A. Bankruptcy Act, §64a(1), the express basis for the referee's order, is by its very language inapplicable; and

B. Said creditors did not by intervention or substitution become parties to the record or the judgment appealed from.

POINT VI

The Court of Appeals below failed to discharge its judicial responsibility by expressly shifting to this Court the decision of whether an admittedly non-binding and erroneous precedent should be repudiated, and by making a *pro forma* decision, in order to advance the matter to this forum, thereby depriving petitioner of a decision to which the merits of his motion entitled him, even according to the opinion below.

ARGUMENT

POINT I

The judgment of April 10, 1947 was final and appealable since it determined all of the fundamental questions involved in the action and settled the substantial rights of all the parties; it in fact disposed of every issue with respect to every party before the court; the subsequent proceedings provided for in said decree did not look to any modification thereof, but rather to its implementation.

An examination of the judgment of April 10, 1947 reveals that it fully determined the merits of every claim which had been asserted in the action (R. 23, 62). Nothing of substance was left. Petroleum Conversion Corporation thereafter had no further interest in or ground for participation in the litigation. All that remained to be done was to enable absent members of the successful class to intervene to secure their respective shares in the amount which the trial court, by said judgment, had already determined was due to the class. These further proceedings merely implemented the judgment. Under such circumstances, it is submitted even under the most conservative definition of a final judgment for the purposes of appeal, said judgment was final and appealable. *Collins* v. *Miller*, 252 U. S. 364, 370.

The mere fact that the decree of April 10, 1947 was not the ultimate judgment in the action, does not of course mean that it was not a final decision for the purposes of appeal within the meaning of Judicial Code §128 (now 28 United States Code §1254). *Reeves* v. *Beardall*, 316 U. S. 283.

Even if a decree does not, like that of April 10, 1947, dispose of every issue with respect to every party then before the Court, it is deemed final and appealable where it adjudicates the fundamental questions in the action and settles the substantial rights of the parties. *Ex parte Norton*, 108 U. S. 237; *Winthrop Iron Co.* v. *Meeker*, 109 U. S. 180; *In re: The Farmers' Loan and Trust Co.*, 129 U. S. 206; *Carondelet Canal & Navigation Co.* v. *Louisiana*, 233 U. S. 362.

The provisions for further proceedings in the 1947 judgment did not affect its finality since they were designed merely to implement the judgment and related to a matter entirely separable from the dismissal of Petroleum's claim; and, contrary to the court below (R. 65) it matters not that the implementation is not solely ministerial. *Forgay* v. *Conrad*, 6 How. 201; *Trustees* v. *Greenough*, 105 U. S. 527; *Thomson* v. *Dean*, 7 Wall. 342; cases cited *supra*, last preceding paragraph.

Thus, in *U. S.* v. *River Range Co.*, *supra*, 269 U. S. 411, 414, it is said:

> "And so, conversely, an adjudication, final in its nature as to the general subject of the litigation, may be reviewed without awaiting the determination of a separate matter affecting only the parties to such particular controversy."

In *Thomson* v. *Dean*, 7 Wall. 342, a decree, providing for further proceedings to adjust the accounts between the parties pursuant to the decree, was nevertheless held final. The Court stressed (at p. 345): "It looks to no future modification or change of decree."

Hill v. *Chicago & Evanston R.R. Co.*, 140 U. S. 52, is apposite. There, the decree dismissed the bill for want of equity against all but one of the defendants; and held

him liable as to one item which was referred to a master to ascertain the amount due complainant. The complainant appealed from that decree but that appeal was dismissed for failure to perfect. Complainant thereafter appealed from the decree based on the master's report. *Held*, that the original decree was final.

Equally apropos is *Lewisburg Bank* v. *Sheppey*, 140 U. S. 445. That was an action to restrain the bank and a trustee under a deed of trust, given to secure grantor's notes held by the bank, from selling the land. Complainants held a subsequent deed to the property, given for the benefit of grantor's creditors, which was recorded ahead of the bank's deed. The first decree held that title was in complainants but provided for sale of the property, the proceeds to be held for distribution. The second decree provided for distribution *pari passu* to grantor's creditors including the bank. The bank appealed from the second decree claiming it was entitled to priority. *Held*, the first decree was final.

A fortiori the decree of April 10, 1947, was final since the matters therein reserved for future proceedings not only did not concern Petroleum Conversion Corporation, but related solely to the claims of persons then not even parties to the action. Indeed, it was not necessary for such then absent parties to intervene in this spurious class action in order to assert their separate and independent rights. *York* v. *Guaranty Trust Co.*, 143 Fed. (2d) 503, 529 (C. A. 2), reversed on other grounds, 326 U. S. 99. A spurious class action is only a permissive joinder device and each claim in the class, even for appeal purposes, is deemed individual and distinct. *California Creators* v. *Weider of California*, 162 Fed. (2d) 893 (C. A. 2); *Gibbons* v. *Equitable Life Ass. Society*, 173 Fed. (2d) 537 (C. A. 2). There was no certainty that

the absent members of the class would intervene, and in fact, not all did (R. 36, 37).

Patently, the outcome of such proceedings whereby the absent members of the class could intervene and assert their claims to what had already been decided was theirs could not in any way alter the determination in the decree of April 10, 1947 dismissing Petroleum Conversion Corporation's claims on the merits.

POINT II

Even if not final as to all parties, the judgment of April 10, 1947, dismissing Petroleum Conversion's counterclaim on the merits after trial was, as to it, final and appealable; *Clark* v. *Taylor* is not in point and erroneous.

Rule 54(b) of the Federal Rules of Civil Procedure as it stood at the time of the 1947 decree, provided for a separate final judgment in an action involving multiple claims where there had been a determination of the issues material to a "particular claim" and all counterclaims arising out of the transaction or occurrence upon which it was based, though other claims stood undetermined (*Reeves* v. *Beardall*, 316 U. S. 283). That Petroleum's claim was a "particular claim" within said Rule 54(b) and the dismissal thereof on the merits was a final judgment is not affected by the pendency of the adverse claim of the Rinke Agency Subscribers, for even if the doctrine, as construed by the Court below (R. 66) of *Clark* v. *Taylor*, 163 F. 2d 940 (discussed, *supra*, pp. 11, 12) apply, no comparable "central core of facts" forming the basis of both of the rival claims here exists (R. 4 par. 4; R. 5 par. 6).

The dismissal of Petroleum Conversion Corporation's claim necessarily required consideration of substantial relevant evidence on the merits in addition to that relevant to the merits of the claim of the Rinke Agency Subscribers, and for this reason the dismissal was a final and appealable decision. *Zarati S. S. Co.* v. *Park Bridge Corp.*, 154 Fed. (2d) 377 (C. A. 2, 1946). In essence, the bases of each of said claims are different and they each constitute "a separate unit of judicial action". *Reeves* v. *Beardall*, 316 U. S. 283, 285. In the *Clark* case there was only one chose in action involved; the dispute between the rival claimants was only as to which of them had the title thereto.

And *Clark* v. *Taylor* is clearly distinguishable on even more basic grounds. In that case nothing was decided as to the merits of the claim itself, whereas here the rival claims were adjudicated on the merits after trial by the 1947 judgment. The absence of a decision on the merits was, contrary to the construction of the Court below (R. 65), a fundamental factor in determining the result in the *Clark* case. The majority opinion there emphasized (163 F. 2d at 942):

> "Upon this record it seems to us that this is a case of suit by the appropriate government official against two rival claimants to the same fund or chose in action, and that *there will be a final judgment only when there is a decision as to the existence and ownership of the property in dispute. The conclusion that a fiduciary claiming to represent one of the claimants to the dispute does not have formal legal title to the assets in question is not a final judgment upon the important and central point in dispute.* * * *" (Italics supplied.)

And again at page 943:

> "Here the central fact concerns the royalties collected by ASCAP for AKM and by AKM for ASCAP and the legality and fact of offset between them. That AKM's right or title may have devolved to Propper (the state court receiver) does not change or lessen the importance of this question." (Matter within parenthesis added.)

The majority in the *Clark* case regarded the dispute between the Alien Property Custodian and the state court receiver as to who shall prosecute the claim against ASCAP on behalf of AKM as merely a "preliminary skirmish" (p. 944). This characterization could hardly be applied in the instant case to the resolution by trial of the issues on the merits as reflected by the 1947 judgment. The criterion of the *Clark* case as to the finality of a judgment that there shall have been a determination of "the important and central point in dispute", "a decision as to the existence and ownership of the property in dispute" points toward the conclusion that the 1947 judgment was final and appealable, at least to Petroleum.

The relationship of the instant case to the *Clark* case is not unlike that of *State of Texas* v. *Chuoke*, 5 Cir., 154 F. 2d 1, cert. den. 329 U. S. 714, to the earlier case of *Catlin* v. *United States*, 324 U. S. 229. In the *Catlin* case the preliminary *ex parte* judgment in a condemnation proceeding, vesting title in the United States, and the denial of a motion to vacate such judgment and the petition seeking condemnation, on the ground that the petition showed on its face that the taking was for an unauthorized purpose, were held to lack finality and hence appealability until full adjudication on the merits. This Court noted that *Dade County* v. *United States*, 5 Cir., 142 F. 2d 230, had held in accord (324 U. S. at 233, fn. 6). But the

Fifth Circuit Court of Appeals, with two of the same judges as in the *Dade County* case sitting, thereafter held in the *Chuoke* case, *supra*, that where the land has already been taken by the Government and the amount of compensation fixed, a judgment that a claimant had no title to part of the land was final and appealable although other controversies arising out of the condemnation had not been fully determined. The analogy to the case at bar is obvious.

Assuming, however, that *Clark* v. *Taylor* is in point, it is submitted that the decision there is erroneous and that the exhaustive dissenting opinion in that case so demonstrates, conclusively. Certainly we could not write a better brief on the question. This Court is therefore respectfully referred thereto for a marshalling of the authorities establishing that "In divers circumstances, it has often been held that an order is final and appealable which shuts out one claimant to assets (tangible or intangible) although the claims of others, not of joint character with the barred claim, remain undetermined"* (163 F. 2d at 946). Petitioner need not go even that far to sustain his position since in his case the decree after trial which "shut out" Petroleum did not leave "undetermined" the rival claim of the Rinke Agency Subscribers; quite the contrary, it determined that they were entitled to recover and fixed the amount of the recovery.

* In accordance with this principle, the court below concurred in the reasoning that, since Petroleum Conversion Corporation would have been obligated to appeal from an order denying its right to intervene in this action, it can not be successfully maintained that it was not so obligated to appeal from a decree dismissing its claims on the merits after trial even if it be assumed that the decree was not final as to the Rinke Agency Subscribers (R. 65).

POINT III

Appeal from the judgment of April 10, 1947 by or on behalf of Petroleum Conversion Corporation is precluded by its consent thereto.

A decree may be entered under such circumstances that consent thereto may be inferred, and an appeal thereby precluded. *U. S.* v. *Babbitt*, 104 U. S. 767; *Nashville, etc. Ry. Co.* v. *U. S.*, 113 U. S. 261, 266; *Pacific R.R.* v. *Ketchum*, 101 U. S. 289;* *Curry* v. *Curry*, 79 Fed. (2d) 172 (App., D. C.)

In the case at bar, the facts (*supra*, pp. 6, 7) demonstrate that from the very beginning Petroleum Conversion Corporation and the representatives of the Rinke Agency Subscribers contemplated that they would jointly present their claims to the trial court and that its determination, if in favor of either of them, would be satisfactory to both. In consequence, the entry of the decree in favor of the class upon the motion of the attorney for the corporation as well the attorney for the class is equivalent to the corporation's formal consent thereto.

* In *Pacific R.R.* v. *Kitchum*, the court affirmed a decree because appellant's solicitors had consented thereto, though it refused to dismiss the appeal on that ground. But there appellant claimed lack of actual consent creating a question of fact which could not be decided on a motion to dismiss. *Swift & Co.* v. *United States*, 276 U. S. 311, 324. Here the facts demonstrating consent as set forth in the moving affidavit (R. 3, 6 & 7) are undisputed, even in the opposing affidavit (R. 41).

POINT IV

The purported appeal by the receiver in bankruptcy of Petroleum Conversion Corporation on its behalf, is a nullity.

A. The notice of appeal sought review only of the 1948 judgment which in no way aggrieved Petroleum Conversion Corporation.

Rule 73(b), F. R. C. P. provides that the notice of appeal "shall designate the judgment or part thereof appealed from; * * *."

The only decree "designated" in the notice of appeal is that of August 3, 1948 which does not determine any of the claims of Petroleum Conversion Corporation and merely awards to the members of the alleged class of Rinke Agency Subscribers, amounts totaling $408,949.57.

The April 10, 1947 decree is not "designated" (R. 38). It must therefore follow that said notice of appeal is a nullity since the decree to which it refers does not aggrieve the appellant and the decree which dismissed the appellant's claim is not specified therein. *French* v. *Jeffries*, 161 Fed. (2d) 97, 99 (C. C. A. 7, 1947).

This is not an instance of where a mere detail in the notice of appeal needs correction; or of an inadvertent error. Here the notice cites an existing and correctly identified decree; indeed, it goes further, it specifies the particular paragraphs thereof (R. 38).

The Court below erred by, in effect, transmuting the appeal from the decree of August 3, 1948 into an appeal from the decree of April 10, 1947. *State of Missouri* v. *Todd*, 122 Fed. (2d) 804, 807 (C. C. A. 8, 1941).

B. The appellant-receiver, appointed outside the district where the notice of appeal was filed, and having failed to obtain ancillary receivership, was without capacity to commence or prosecute said appeal.

A bankruptcy receiver is without capacity to act where appointed in some other district. *In re: Benedict*, 140 Fed. 55 (D. C., E. D., Wisc., 1905); see *In re: Kaufman*, 21 Fed. (2d) 799 (D. C., S. D., N. Y.). His appointment has no extraterritorial effect. *Moore* v. *Mitchell*, 281 U. S. 18, 24; *Booth* v. *Clark*, 17 How. 327; *Hale* v. *Alinson*, 188 U. S. 56. In order to have capacity to act within a district other than that of his appointment, the receiver must be appointed as an ancillary receiver. Bankruptcy Act, §69 (c), 11 U. S. C. A., §109 (c) and General Order #51, 11 U. S. C. A., §53 foll., providing for ancillary receiverships, would otherwise be meaningless. Here no ancillary receivership was obtained (R. 7).

C. The receiver, named in the notice of appeal as the appellant, was not a party to the record and the judgment appealed from.

Rule 73, F. R. C. P. provides in part "a party may appeal from a judgment by filing with the District Court a notice of appeal * * *. The notice of appeal shall specify the parties taking the appeal; * * *". As this court has said "one who is not a party to a record and judgment is not entitled to appeal therefrom. *Bayard* v. *Lombard*, 9 How. 530; *Indiana* v. *Liverpool, London & Globe Ins. Co.*, 109 U. S. 168; *Ex parte Cockraft*, 104 U. S. 578." *Ex parte Leaf Tobacco Board of Trade*, 222 U. S. 578, 581. In accord: *United States* v. *Jack*, 244 U. S. 397, 400; *Ex parte Cutting*, 74 U. S. 14; *Orpheum Corp.*, 70 Fed. (2d) 621 (C. A. 2, 1934).

A receiver in bankruptcy is merely an officer of the court and represents neither the bankrupt nor his creditors; he is nothing more than a custodian. 8 C. J. S., §150, p. 587. Not even a bankruptcy trustee becomes, by the mere fact of his appointment, a party to lawsuits in which the bankrupt is a plaintiff. A trustee may decline to prosecute an action instituted by bankrupt if he believes that it will not benefit the estate. Intervention or substitution in place of the bankrupt is not mandatory. *Meyer* v. *Fleming*, 327 U. S. 161, 165; *Danciger* v. *Smith*, 276 U. S. 542; *Johnson* v. *Collier*, 222 U. S. 538; *In re Prudence Co.*, 96 Fed. 2d 157 (C. A. 2). Intervention or substitution is required to make a trustee, and certainly a receiver, a party to the action. *Western Star Lodge* v. *Burkes Construction Co.*, 267 Fed. 550 (C. C. A. 5, 1920). Such intervention or substitution is the recognized course of procedure for prosecution of an appeal by a trustee. *Herndon* v. *Howard*, 9 Wall. 664 (1896); *Knox* v. *Exchange Bank*, 12 Wall. 379 (1870).

In absence of such intervention or substitution, the appeal may be prosecuted by the bankrupt. *Sanford* v. *Sanford*, 58 N. Y. 67; *Schoonmaker* v. *Pittsburgh Contracting Co.*, 176 App. Div. 48, 161 N. Y. Supp. 186. Here Petroleum Conversion Corporation at no time took an appeal or authorized an appeal on its behalf (R. 7, par. 12, subd. 6).

It therefore follows that the appeal taken by Petroleum Conversion Corporation's temporary receiver in bankruptcy is meaningless since he was not a party to the action.

D. The notice of appeal was not subscribed by the receiver, the appellant named therein, or his attorney, but by the attorney for the bankrupt, disqualified to act for the receiver and unauthorized by the bankrupt to institute the appeal.

The notice of appeal in question was subscribed by the attorney for Petroleum Conversion Corporation as such (R. 39). He was not authorized to act for the appellant named in the notice of appeal, the temporary receiver. On the contrary, he was clearly disqualified to so act. General Order #44, 11 U. S. C. A., foll. §53 (R. 7, par. 12, subd. 4). *In re Rogers-Pyatt Shellac Co.*, 2 Cir., 51 F. 2d 988.

To this contention the Court below answers that "Since the Petroleum Conversion Corporation, though bankrupt, could take the appeal, as a step quite outside the bankruptcy proceeding, it was free to be represented by an attorney of its choice" (R. 66). But this is entirely beside the point. The underlying premise is erroneous. Petroleum Conversion Corporation, though it could, did not in fact take or authorize this appeal (R. 7, par. 12, subd. 5). This is undisputed (R. 41). Petroleum Conversion Corporation while "free to be represented by an attorney of its choice" made no such choice to be represented in said appeal. It in no way appeared or participated therein. It had decided not to appeal from the dismissal of its claims (R. 6). The Court below was clearly in error as to these fundamental facts.

The conclusion is still valid that the notice of appeal was a nullity because it was not subscribed by the appellant named therein but by an attorney who did not and could not represent him. (See Official Form 27, following Federal Rules of Civil Procedure.)

POINT V

The bankrupt's creditors, authorized by the referee's order to prosecute the appeal, and their attorney, nevertheless had no standing to oppose petitioner's motion to dismiss the appeal.

Prior to petitioner's motion to dismiss (R. 1, *et seq.*) the trustee in bankruptcy for Petroleum Conversion Corporation had declined, for reasons detailed in his report to the Referee (R. 58), to prosecute the appeal commenced by him as receiver, and such declination had been approved by the Referee without objection by any of the creditors (R. 61). Notice of said motion was given to the attorney for Petroleum Conversion Corporation and the attorneys for the various subscribers as well as the attorney for defendant Lloyd's Estate (R. 2). Notice of said motion was also given to Alexander Kahan, Esq. as the attorney for the trustee in bankruptcy (R. 2) by reason of the fact that he had so described himself in his immediately preceding motion for an extension of time to perfect said appeal (R. 49, 51).

The sole opposition to the motion to dismiss the appeal came from Mr. Kahan; Petroleum Conversion Corporation did not appear (R. 62).

Mr. Kahan, whose previous maneuver to get into the case by a motion for leave to intervene on behalf of certain Petroleum Conversion Corporation preferred stockholders was thwarted by the District Court (R. 56, R. 60), derives his claim of right to appear in opposition to the motion to dismiss solely from the Referee's order permitting four named creditors "by their attorney and

attorney-in-fact, Alexander Kahan, Esq." to prosecute said appeal (R. 47).*

Petitioner challenges the validity of said order, and even if valid, its effectiveness to create *per se* a status in the appeal for Mr. Kahan and his real clients, the four creditors authorized to prosecute the appeal.

A. Bankruptcy Act §64a(1), the express basis for the referee's order, is by its very language inapplicable.

Bankruptcy Act §64a(1), 11 U.S.C.A. 104a(1), provides in so far as is here material:

> "Debts which have priority. a. The debts to have priority, in advance of the payment of dividends to creditors and to be paid in full out of bankrupt estates, and the order of payment shall be (1) * * * where property of the bankrupt transferred or concealed by him either before or after the filing of the petition shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of such recovery * * *."

This language is too clear to require argument. Patently its scope, and the inferential power of the Bankruptcy Court thereunder to authorize prosecution of litigation for the benefit of the estate, is limited to

* The order does not authorize Mr. Kahan to act as attorney for the trustee, contrary to his assertion (R. 52); that would require compliance with General Order 44, 11 U.S.C.A. §53 foll. On the other hand, it does purport to substitute him "as the attorney for appellant, Petroleum Conversion Corporation, upon the said appeal" (R. 47, 49). However, his motion to effect such substitution (R. 43, 44, subd. 3) was denied (R. 68, fol. 96; 69, fols. 97, 98) and significantly, the introduction to the opinion below carefully but conspicuously omits describing for whom Mr. Kahan appeared in opposition to the motion to dismiss the appeal (R. 62, fol. 87).

creditors' actions to recover property fraudulently transferred or concealed *by the bankrupt*. The bankrupt in such an action would be a defendant; not, as in the case at bar, a virtual plaintiff, seeking a judgment for breach of fiduciary duty.

The authorities are in accord. The ambit of Section 64(a) is not to be extended beyond the confines of its language; the enumeration therein of instances for its application excludes all others. *In re First Bond and Mortgage Co.*, 5 Cir., 74 F. 2d 930, 932; *Southern Bell T. and T. Co. v. Caldwell*, 8 Cir., 67 F. 2d 802; *James Butler Grocery*, D. C. N. Y., 22 F. Supp. 998, aff'd 2 Cir., 100 F. 2d 376, 378.

And the implicit recognition by this statute of the power of the court to authorize creditors' actions for the benefit of the estate is restricted to suits for the recovery of property transferred or concealed by the bankrupt. 3 Collier on Bankruptcy §64.104 p. 2066.

The court below therefore erred in approving the order of the referee authorizing the prosecution of the appeal in the case at bar (R. 67), and such invalid order could not give said creditors or their attorney status to oppose petitioner's motion.

B. Said creditors did not by intervention or substitution become parties to the record or the judgment appealed from.

The intent of the Referee's order (R. 47) that the creditors authorized to prosecute the appeal should become parties thereto is plainly evident from the following:

> (1) the provision in the order that such prosecution shall be without liability on the part of the Bankrupt Estate for any costs, fees or expenses, unless successful;

(2) the absence of any provision for any bond or other security to be furnished by the creditors to insure that the estate will be held harmless from any such liability; an obvious precaution, if the creditors were not to be actual parties;

(3) the reference to Bankruptcy Act §64a(1) which applies only to suits wherein the creditors are themselves the parties.*

The creditors, of course, could not and did not become parties to the appeal in the Second Circuit Court of Appeals by virtue of the order by the Delaware referee in bankruptcy, particularly since it was merely a permissive order. An order of said Court of Appeals, allowing such substitution or intervention was required. *Western Star Lodge v. Burkes Constr. Co.*, 5 Cir., 267 Fed. 550. Absent such substitution or intervention, the said creditors and their attorney lacked status to oppose petitioner's motion to dismiss, (1) for lack of compliance with the implied conditions of the referee's order and (2) they had not become parties to the record and judgment appealed from and were therefore strangers to the appeal. (See *supra*, p. 33.)

* True, the order provides that the said appeal shall be prosecuted in the name of the bankrupt and the trustee for the benefit of the bankrupt. But manifestly that was only to insure that the recovery in action, if any, would accrue to the estate; the order lacks any other provision for such protection to the estate; a bond, considering the sum involved, would have imposed too onerous a burden.

The provision under consideration is consistent with the intervention by the creditors as parties to the appeal. Its effect in the light of the order as a whole is that the prosecution of the appeal is to be in the name of the bankrupt and the trustee, for the benefit of the bankrupt estate, by the named creditors, as in an action on behalf of an infant by a guardian *ad litem*, or on behalf of an incompetent by his conservator or committee. Then the creditors' attorney could act in his true capacity.

POINT VI

The Court of Appeals below failed to discharge its judicial responsibility by expressly shifting to this Court the decision of whether an admittedly non-binding and erroneous precedent should be repudiated and by making a *pro forma* decision, in order to advance the matter to this forum, thereby depriving petitioner of a decision to which the merits of his motion entitled him, even according to the opinion below.

Unquestionably, the Court below, if it would have decided this matter on the merits in accordance with the conclusions and convictions of the judges on the bench, the decision would have been in favor of the petitioner here (R. 64 to 66). The sole reason why the petitioner was deprived of a decision on the merits is that the Court itself failed to repudiate a precedent established by brother judges despite the fact, as the opinion below itself points out, that it was not an authoritative precedent and that it conflicted with the convictions of the judges who heard this matter (R. 66). Instead, the Court expressly shifted to this Court the question whether the said precedent should be repudiated (R. 66), a question which was clearly before it, but which it failed to determine on the merits. What the Court, in substance, did was to enter a *pro forma* order denying the motion and simultaneously, in effect, invite the granting of a writ of certiorari so as to have this Court resolve the issue (R. 66).

Under these circumstances, it is respectfully submitted, it can reasonably be said that the decision below was not a "responsible exercise of the judicial process" (*Helvering*

v. *Hallock*, 309 U. S. 106, 119). The Court failed to discharge its duty to decide the issues properly before it on the merits according to law, 14 Am. Jur., §48, and to repudiate a non-binding precedent, which the Court was convinced was erroneous. *F. B. Vandergrift & Co.* v. *United States*, 3 Cir., 173 F. 609. What was said in *Stas* v. *Rochester Railway Co.*, 18 App. Div. 506, 507, 46 N. Y. Supp. 582, 593, app. dism. 159 N. Y. 567, 54 N. E. 1094, is particularly apt:

> "* * * Under our present system of judicature it is designed that this court shall be the ultimate tribunal in cases of this character, and it would be doing violence to the plain intent of that system to render a *pro forma* decision merely for the purpose of advancing the case to another forum * * *"

The evident departure by the Court below from the usual and accepted standards for the discharge of judicial responsibility requires, it is submitted, the exercise by this Court of its supervisory powers.

CONCLUSION

A writ of certiorari should be granted.

Dated, New York, June 22, 1949.

Respectfully submitted,

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